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CLERK OF SUPREME COURT
STATE OF WASHINGTON

No. ~~79384-1~~

79384-1

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM F. JENSEN,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Richard A. Jones

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUE PRESENTED FOR REVIEW

In *State v. Varnell*, 162 Wn.2d 165, 170 P.3d 24 (2007), this Court concluded that a single agreement to solicit the murder of several victims amounts to a single unit of prosecution supporting a single conviction regardless of the number of potential victims. Mr. Jensen agreed over the course of several meetings to pay for the murder of his wife, her sister, and his two children in an overarching plan to inherit his wife's separate estate, and was subsequently convicted of four counts of solicitation of murder. Does *Varnell* compel the reversal and dismissal of three of those counts as there was but a single unit of prosecution?

B. STATEMENT OF RELEVANT FACTS

William Jensen was convicted of soliciting Greg Carpenter to kill his wife, her sister, and his daughter and son. CP 1-3. The information charged that Mr. Jensen

during a period of time intervening between July 1, 2003 through July 26, 2003, with the intent to promote and facilitate the commission of a crime, to wit: Murder in the First Degree of Robyn Jensen, offered to give and gave away money to another to engage in conduct which constitutes such crime and which would establish complicity of such other person in its commission or attempted commission had such a crime been attempted or committed.

CP 1.¹

At trial, Greg Carpenter testified he met Mr. Jensen in July 2003 when the two were incarcerated in King County Jail. 5/24/04RP 147-48. Mr. Jensen was awaiting trial on harassment and domestic violence charges involving his wife. According to Carpenter, Mr. Jensen shared that he was having financial troubles with his wife and Carpenter offered to help. 5/24/04RP 149. In their initial conversation, Carpenter contended Mr. Jensen said he wanted to inherit his wife's separate wealth and wanted her killed. 5/24/04RP 151-52. According to Carpenter, a day and a half later, the two met again and Mr. Jensen wanted his wife's sister killed as well and if the rest of his own family was killed that was fine. 5/24/04RP 151. The next day, Carpenter recounted that the plan now included Mr. Jensen's 18 year-old daughter, because Mr. Jensen feared she would inherit her mother's money if her mother was killed. 5/24/04RP 152. Ultimately, the plan was for Carpenter to kill Mr. Jensen's wife, her sister, and his daughter, for which Carpenter would receive \$150,000. 5/24/04RP 150-52. The plan according to Carpenter was for Carpenter to drug the victims, place them in a van and drive it off a cliff. 5/24/04RP 162. Mr. Jensen

¹ The language in the information regarding the three additional counts was identical except for the name of the intended victim. CP 1-3.

wanted the killings to occur prior to his trial on the domestic violence charges. 5/24/04RP 163.

Carpenter wanted some money as a down payment and the two agreed that Mr. Jensen would pay Carpenter \$2500 upon Carpenter's release and another \$2500 later. 5/24/04RP 158. Carpenter was released on July 10, 2003, and three hours later he met with Mr. Jensen's sister, who provided the money to Carpenter. 5/24/04RP 163-64; 5/25/04RP 6, 115. Carpenter was arrested on an unrelated matter prior to the second meeting. 5/25/04RP 10.

Once in jail, Carpenter contacted the Seattle Police and provided information of the plot to kill Mr. Jensen's family. As a result of this information, a plan was conceived where an undercover police officer, Sharon Stevens, acting as Carpenter's sister would meet with Mr. Jensen to confirm the details of the plan while being surreptitiously recorded. The first of these meetings occurred on July 24, 2003, where Mr. Jensen discussed the timing of the additional payments. 5/26/04RP 74-92. This meeting was not recorded. A second meeting occurred on July 26, 2003, where the terms of the additional payments were again discussed. 5/25/04RP 147-51; 5/26/04RP 103-5. At this meeting, Mr. Jensen informed Stevens he also wanted his minor son killed as well and

agreed to pay an additional sum for that. 5/26/04RP 114-15, 118-121. Mr. Jensen was subsequently convicted of four counts of solicitation of first degree murder, one count for each family member. CP 1-3.

C. ARGUMENT

UNDER *VARNELL*, THERE WAS BUT A SINGLE
UNIT OF PROSECUTION MERITING A SINGLE
CONVICTION

1. A strict application of *Varnell* renders the additional convictions improper. In *Varnell*, on facts remarkably similar to Mr. Jensen's matter, this Court held that a solicitation to commit multiple murders made to one person at the same time in the same place for the same motive constituted a single unit of prosecution and supported only a single conviction for solicitation of murder. 162 Wn.2d 165, 170 P.3d 24 (2007). In *Varnell*, the defendant was involved in an acrimonious divorce and offered one of his employees \$50,000 to kill his wife. The employee declined and contacted Mr. Varnell's wife, who in turn called the police. Under police supervision, the employee contacted Varnell and told him she had found someone who had agreed to kill Varnell's wife. A police detective contacted Varnell posing as the individual and Varnell solicited the detective to kill his wife, her brother, and their

parents, paying the detective \$100 as a down payment. *Varnell*, 162 Wn.2d at 168. The plan was for the detective to kidnap Varnell's wife from her house and her parents and her brother from their house, placing all of them in a car and driving the car into a river, thereby making it look like an accident. *State v. Varnell*, 132 Wn.App. 441, 445, 132 P.3d 772 (2006), *reversed*, 162 Wn.2d 165 (2007). Varnell was subsequently arrested, charged, and convicted of four counts of solicitation of murder.²

Relying on its decision in *State v. Bobic*, 140 Wn.2d 250, 263-66, 996 P.2d 610 (2000), which dealt with multiple convictions for conspiracy, this Court concluded

that the solicitation statute, as does the conspiracy statute, criminalizes the act of engaging another to commit a crime. The unit of prosecution is centered on each solicitation regardless of the number of crimes or objects of the solicitation.

Varnell, 162 Wn.2d at 170. This Court noted a different result would result however, where the facts supported multiple agreements based upon the time, persons, places, offenses, and overt acts involved. 162 Wn.2d at 171. This Court ruled that a single act of solicitation occurred:

² Varnell was also convicted of an additional count of solicitation of murder involving his initial offer to the employee. This Court ruled this count was proper since it was a separate and distinct crime involving a different person and made at a different time. *Varnell*, 162 Wn.2d at 172.

Varnell's solicitation to the undercover detective to commit the four murders was made only to the detective, at the same time, in the same place, and for the same motive. This scenario constitutes a single unit of prosecution. The result logically flows from the fact that the appropriate focus of the crime of solicitation in Washington is on the enticement, not the specific criminal object or objects. Here, the focus is appropriately on the single conversation between Varnell and the detective when Varnell, with intent to facilitate a crime, offered the detective money to engage in specific conduct. The focus is not on the future criminal conduct the detective may have engaged in, but on the solicitation by Varnell to so engage. Under these circumstances, only one solicitation occurred.

Varnell, 162 Wn.2d at 171-172.

Based on the facts in *Varnell*, there is nothing to distinguish that case from Mr. Jensen's. Each involved the solicitation to commit a number of killings with each victim being kidnapped from a different location and being brought to a single location where the killings would occur. Also, both matters involved a meeting where a cash down payment was made. As a result, Mr. Jensen contends *Varnell* controls the outcome of his case.

2. Additional conversations and meetings regarding Mr. Jensen's plan forming the basis of ongoing negotiations does not alter the analysis. The State fastens onto the fact there were several conversations between Carpenter and Mr. Jensen, thus distinguishing this case from *Varnell*. Further, the State notes Mr. Jensen spoke with two individuals about the plan, Carpenter and the undercover police officer acting as Carpenter's sister, thus further distinguishing this case from *Varnell*. The State's analysis ignores that the focus in determining the unit of prosecution is on the agreement or "enticement" not the number of victims or crimes. *Varnell*, 162 Wn.2d at 171-72 ("Here, the focus is appropriately on the single conversation between Varnell and the detective when Varnell, with intent to facilitate a crime, offered the detective money to engage in specific conduct."); *Bobic*, 140 Wn.2d at 265 ("[t]he appropriate focus in Washington is on the conspiratorial agreement, not the specific criminal object or objects.").

It seems clear that Mr. Jensen's motive for wanting his wife killed never changed in his discussions with Carpenter and the undercover police officer: he wanted to inherit his wife's wealth. From this premise, he engaged in a series of discussions with Mr. Carpenter where the plan to carry out this objective evolved. These

negotiations provided the basis for the agreement between Mr. Jensen and Carpenter for Carpenter to kill three of the potential victims for \$150,000. This was the agreement for which Mr. Jensen made his \$2500 down payment. The additional meeting between Jensen and Stevens, acting as Carpenter's agent and meeting with Mr. Jensen merely to document the prior agreement, must be seen merely as an addendum to the already negotiated agreement. Thus, the fact there were multiple meetings between Carpenter and Mr. Jensen was immaterial as the meetings did not involve separate solicitations but were negotiations regarding a single plan to carry out Mr. Jensen's single motive that was revealed at the initial meeting between Carpenter and Mr. Jensen.

This is consistent with the plain language of the solicitation statute. Under RCW 9A.28.030, a person is guilty of solicitation when, with intent to facilitate the commission of a crime, "he offers to give or gives money . . . to another to engage in specific conduct which would constitute such crime." Here, the specific conduct for which Mr. Jensen gave Carpenter money was the elimination of his family in order to carry out his plan of inheriting his wife's separate wealth.

The State's assertion that Mr. Jensen's additional conversations with the undercover police officer supported multiple solicitation convictions is in error for additional reasons. Mr. Jensen's plan did not change from his agreement with Carpenter upon which he made the down payment and his conversations with the undercover police officer; he wanted his wife and her heirs eliminated so he could inherit his wife's wealth. Mr. Jensen's discussions with the undercover police officer were intended by the police to merely corroborate what Carpenter had told them. The subsequent recording of one of those two meetings did just that; the plan did not change, and the means for killing the intended victims did not change. Mr. Jensen still wanted the intended victims dead so that he could inherit his wife's money, he merely added the remaining family member who could have potentially inherited his wife's wealth.

In *Varnell*, in determining whether the facts of that case revealed more than one act of solicitation, this Court looked again to its decision in *Bobic*, specifically its reliance on the decision in *State v. Walker*, 24 Wn.App. 78, 599 P.2d 533 (1978). *Varnell*, 162 Wn.2d at 171. In *Walker*, the defendant was charged with three counts of conspiracy to possess heroin with intent to deliver based

on a delivery to one Hill and agreements by two others to sell heroin for the defendant. *Walker*, 24 Wn.App. at 80. Mr. Walker unsuccessfully contended that there was but one criminal enterprise to deliver heroin. The appellate court found there were in fact three separate agreements supporting the three counts of conspiracy:

Here, the agreements occurred between Walker and three separate persons, at different times, places, and for somewhat different purposes. The fact that there is one individual common to separate criminal enterprises or an interrelationship between conspiracies does not necessarily make them a single criminal enterprise. *United States v. Ingram*, 541 F.2d 1329, 1331 (9th Cir. 1976); *United States v. Cole*, 457 F.2d 1141, 1145 (9th Cir. 1972). Separate elements of time, persons, places, offenses, and overt acts will, if shown to be substantially distinct, support separate conspiracy prosecutions. *United States v. Ingram*, *supra* at 1131. We find there was evidence of substantially distinct elements here to support the separate counts of conspiracy.

Walker, 24 Wn.App. at 81.

In Mr. Jensen's case, the players remained the same throughout; Mr. Jensen was agreeing to pay Carpenter to eliminate the members of his family. Mr. Jensen's negotiations with Carpenter while in jail resulted in the agreement that Mr. Jensen would pay \$150,000 for the elimination of three members of the family. The separate discussions between Mr. Jensen and Officer

Stevens did not support a separate solicitation. Stevens was acting as Carpenter's agent and the discussions between the two resulted in Mr. Jensen agreeing to pay Carpenter additional money for Carpenter to eliminate Mr. Jensen's son, an addendum to the original agreement. There was nothing "substantially distinct" in the two sets of discussions that would have supported separate acts of solicitation, the actors remained the same, Carpenter and Jensen, and the purpose remained the same, to eliminate Jensen's family members at the same time in the same place. *Walker*, 24 Wn.App. at 81. There was but one act of solicitation.

3. Decisions from other jurisdictions on similar facts support Mr. Jensen's contention. Also consistent with Mr. Jensen's argument are decisions from two jurisdictions involving similar facts those in this case. In *People v. Morocco*, 191 Cal.App.3d 1449, 237 Cal.Rptr. 113 (1987), Mr. Morocco was convicted of solicitation to commit murder under California's solicitation statute which is similar to Washington's statute. Mr. Morocco spoke with one Wingard with the idea of Wingard killing Morocco's ex-wife and her new husband. 191 Cal.App.3d at 1450. The plan evolved over a series of meetings with Morocco promising Wingard drugs and weapons for carrying out the killings. Ultimately, Morocco provided

Wingard with a quantity of methamphetamine and a loaded handgun. *Id.* The California Court of Appeals reversed Morocco's conviction for two counts of solicitation, finding:

We find it unnecessary to reverse for a retrial because we agree with Morocco that the evidence, even when viewed in the light most favorable to the prosecution, establishes but a single crime of solicitation. The potential victims were a husband and wife. They were to be killed at the same time, presumably by the same means. The record is very unclear as to Morocco's motive in soliciting the killings, but there is certainly no suggestion of an independent motive or objective as to each victim. Whatever the distorted plan Morocco fashioned, it appears to have encompassed both Tom and Peggy Steele.

Morocco, 191 Cal. App. 3d at 1454.

Similarly, in *Wyatt v. Commonwealth of Kentucky*, 219 S.W.3d 751 (2007), the Kentucky Supreme Court came to the same conclusion where there were multiple discussions with several people regarding a plan to kill certain identified police officers. Wyatt, a drug dealer, wanted a police drug enforcement officer killed and told one of her clients, one Ferguson, this. Ferguson immediately went to the police, told them of Wyatt's intent, and agreed to act as a wired informant. Ferguson had an additional conversation with Wyatt where she reiterated her wish to have the officer killed and added she wanted his partner killed as

well. A third meeting took place approximately one month later with Ferguson being accompanied by an undercover police officer. During this discussion, the three negotiated the manner and cost of killing the detectives, agreeing the detectives would be shot and drugs would be the manner of payment. No final price was decided. Wyatt was subsequently charged and convicted of two counts of solicitation of murder, one for each potential victim.

The Kentucky Supreme Court, as this Court did in *Varnell*, analogized the solicitation statute to the conspiracy statute in determining whether double jeopardy barred multiple convictions for solicitation on these facts:

The offense of criminal solicitation emerged from the offense of criminal conspiracy, and was designed to address situations where one party offered to conspire with another, but the other rejected the offer. Criminal solicitation simply recognizes that a refusal of the other to participate does not reduce the mental culpability of the solicitor. By the same token, however, a refusal by the person solicited to participate should not result in greater punishment than if there had been a completed agreement.

Wyatt, 219 S.W.3d at 761 (internal citations omitted). From this the Court concluded that separate convictions would violate double jeopardy:

As applied to this case, had Special Agent Thielhorn been an actual assassin and accepted Appellant's

alleged solicitation, thereby creating an agreement between the two, Appellant would have been subject to prosecution for one count of conspiracy, not two counts of solicitation. KRS 506.050(2) would allow only one charge of conspiracy to be brought. It would be illogical to obtain a different result where the conspiracy fails and the only crime committed is solicitation. As we have determined that there was only one act of encouragement, Appellant may be convicted of only one act of solicitation.

Id.

The *Wyatt* Court's analysis mirrors this Court's analysis in *Varnell* where this Court relied on its decision in *Bobic*, a conspiracy case, to rule that multiple convictions for solicitation may not stand when there is but one plan regardless of the number of victims. Both the *Morocco* and *Wyatt* decisions are based on the same rationale as this Court's ruling in *Varnell*, and as a consequence, this Court should rule in a consistent manner and conclude that there can only be one conviction in Mr. Jensen's case. Vacating three of Mr. Jensen's convictions is entirely consistent with *Varnell* as the focus remains on the act of solicitation, Mr. Jensen's desire to have all of his imagined competitors to his wife's estate eliminated so he would be the sole heir.

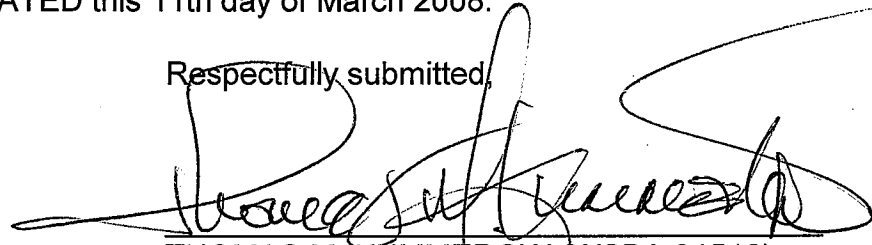
To analogize to the conspiracy statute, as this Court did in *Varnell*, and as the court in *Wyatt* did as well, the question arises whether the State could have charged Mr. Jensen with four counts of conspiracy based upon the facts in this case. Assuming Carpenter did not go to the police but agreed to the plan, could the State have charged multiple conspiracies, one for each victim. The overwhelming answer must be it could not because the facts would have established only one conspiracy that existed between Mr. Jensen and Carpenter to eliminate Jensen's family. *Bobic*, 140 Wn.2d at 266; *Wyatt*, 219 S.W.2d at 761. There was but one agreement between Mr. Jensen and Carpenter which would have subjected them to only one count of conspiracy, the agreement to kill Jensen's family members for which Carpenter would be paid. Each killing was intended to further the goals of the criminal enterprise which was the elimination of Jensen's family. *Bobic*, 140 Wn.2d at 266. Stevens was merely acting on behalf of Carpenter and agreed only to the addition of another potential victim for additional money. The analysis under the solicitation statute must be the same as "[i]t would be illogical to obtain a different result where the conspiracy fails and the only crime committed is solicitation."

D. CONCLUSION

For the reasons stated, Mr. Jensen submits that under *Varnell* and the facts of his case there was evidence of only one act of solicitation. As a consequence, Mr. Jensen submits this Court must reverse and order dismissed the three additional counts of solicitation.

DATED this 11th day of March 2008.

Respectfully submitted,



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Respondent,

v.

WILLIAM JENSEN,

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NO. 79367-1

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CERTIFICATE OF SERVICE

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 11TH DAY OF MARCH, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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JULIE ANN KAYS

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SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF MARCH, 2008.

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